United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2008

To be argued by
JERRY L. SIEGEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-2008

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P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

ERNEST WALTERS,
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Ernest Walters appeals from an order entered on December 16, 1975 in the United States District Court for the Southern District of New York by the Honorable Morris E. Lasker, United States District Judge, denying without a hearing Walters' motion pursuant to Title 28, United States Code, Section 2255, to vacate his judgment of conviction and sentence.

Indictment 73 Cr. 592, containing eleven counts, was filed on June 15, 1973.* The indictment charged Walters and six co-defendants with conspiracy to distribute and distribution of Schedule I narcotic drug controlled substances, namely heroin. Walters was named in counts one, two, four, seven, eight, and ten. Count one charged

* Indictment 73 Cr. 592 superseded Indictment 73 Cr. 335.

Walters and six others with conspiring to distribute heroin in violation of Title 21, United States Code, Section 846, while counts two, four, seven, eight and ten each charged Walters and others with distributing and possessing with intent to distribute heroin in quantities from one-quarter kilogram to one kilogram, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.

The trial of Walters and four co-defendants * commenced on September 11, 1973 and concluded on September 24, 1973, when the jury found Walters guilty on count two and not guilty on counts one and seven. The jury was unable to reach a verdict as to Walters on counts four, eight, and ten.

On November 9, 1973, Judge Lasker sentenced Walters to a four year term of imprisonment. On December 7, 1973, Walters filed a notice of appeal. When Walters failed to perfect the appeal, despite the granting of an extension of time within which to do so, this Court ordered the appeal dismissed on January 14, 1974.

On March 19, 1975, Walters moved pursuant to 28 U.S.C. § 2255 to vacate his conviction and sentence.** In a memorandum opinion filed on December 16, 1975, Judge Lasker denied the motion.***

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* On June 22, 1973, two of the defendants pleaded guilty to count one of Indictment 73 Cr. 592.

** On May 8, 1975, the Government filed an affidavit and memorandum of law in opposition to the motion. Determination of the motion was delayed to permit the filing of a supplemental memorandum of law on behalf of, and at the request of the petitioner, which was done on October 15, 1975.

*** Judge Lasker's opinion is officially reported as *Walters* v. *United States*, 404 F. Supp. 996 (S.D.N.Y. 1975).

Statement of Facts

Following the filing of Indictment 73 Cr. 592, the court convened a pre-trial conference on June 26, 1973 at which time, counsel for all parties, including Wilson Graves, Esq., whom Walters had retained to represent him, were advised by the court that trial of this matter would commence on September 10, 1973. (Tr. 18, 54). On September 5, 1973, at a pre-trial conference in Judge Lasker's Chambers, Graves informed the court and the government for the first time that he might be on trial in the Civil Court of New York City on the day Walters' trial was scheduled to commence. Graves assured the court and counsel, however, that if he were unable to appear and represent Walters, he would arrange to have another attorney appear in his place. (Tr. 18, 55-57).

On September 10, 1973, a hearing was held to determine whether the government had properly "minimized" the interception of certain telephone communications conducted pursuant to court-authorized warrants. Graves did not appear at this hearing but arranged for another attorney, Mr. Bair, to represent Walters. Appellant raised no objection to this procedure.

Despite the fact that "all parties had been advised that the trial would follow upon conclusion of the minimization hearing" (Opinion at 1), the next day, September 11, 1973, neither Graves nor the substitute attorney appeared in court. The court initially delayed selection of a jury in hopes that one or the other attorney might arrive. Anticipating the possibility that neither attorney might appear, the court called appellant, co-defendant Saunders and his attorney, Mr. Berne, into the robing room to determine whether it might appoint Berne to represent Walters for purposes of jury selection only. The court then addressed appellant:

> Mr. Walters, as you know, your attorney, Mr. Bair, has not yet arrived, and I would like to proceed choosing the jury and start the case. I imagine all of you would like to do that. But, in any event, I have to make the decision.
>
> I have asked Mr. Berne and Mr. Saunders to come in because I would like to have Mr. Berne represent you during the course of the choosing of the jury, unless Mr. Berne, as Mr. Walters' lawyer, or Mr. Walters [sic] or yourself, indicate you think that there is any conflict between your position and Mr. Walters' position in this case so it would be adverse for you, unfavorable to you to have the same lawyer representing you even in the choosing of the jury. (Tr. 11).

When Saunders himself objected to his attorney representing Walters due to a possible conflict of interest, the court called appellant, co-defendant Boone and his attorney, Mr. Brown, into the robing room and after some discussion, determined that Mr. Brown could in fact represent Walters during the selection of the jury if necessary. The court then asked Walters whether he objected to Mr. Brown thus representing him for this limited purpose, to which Walters replied that he would rather wait for his own attorney. (Tr. 14). The court acceded to his wishes, but stated:

> I can't wait indefinitely, of course with forty people waiting standing in back of the courtroom, and while you do ordinarily have the right to be represented by your own attorney, and I will wait a brief time, if he doesn't show up soon based on Mr. Brown's statement that he as a lawyer does not know of any conflict that would prevent him from representing you fairly in the choosing of the jury, I may have to order that you be represented. But, I will give a reasonable period of time for Mr. Bair to show up. (Tr. 14-15).

Later that morning, the court received an affidavit from Graves advising that he was engaged in the Civil Court and that he was unable to appear on behalf of Walters. Graves also requested a severance of his client from the trial of the co-defendants. The court denied the request and in light of the certainty that Graves would not appear, indicated its intention to proceed with the selection of a jury. (Tr. 19-20). To that end, the court appointed Brown to represent Walters during the jury selection, telling Walters "I am persuaded that your interests will not be adversely affected by having somebody else represent you merely in the choosing of the jury." (Tr. 20).

Following the selection of the jury, all proceedings were suspended until the presence of appellant's retained counsel could be obtained.* Later that day, after the jury had been released, Graves was taken into custody by a Deputy United States Marshal acting on a warrant issued by Judge Lasker. (Tr. 71). The next day, September 12, 1973, Graves appeared and represented Walters for the remainder of the trial.

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* Judge Lasker himself arranged to have Graves come to the courthouse at 1:20 P.M. and discussed the situation with him (Tr. 59-62). Despite efforts later that day, including several calls to the Civil Court Judge, Judge Lasker was unable to secure Graves' presence and adjourned the case until September 12, 1973. (Tr. 70-73).

ARGUMENT

POINT I

Walters' 2255 claim is barred because he deliberately by-passed this claim at trial and on appeal.

The order of the District Court denying the instant application pursuant to 28 U.S.C. §2255 should be affirmed without reaching the merits of the claims discussed and rejected therein since appellant deliberately by-passed available appellate procedures following his conviction, with respect to those claims.*

In *Sunal* v. *Large*, 332 U.S. 174, 178 (1947), the Supreme Court held that the interest in finality precluded collateral review of errors of law committed by the trial court where petitioner had not raised the claims on appeal, and hence that "the writ of habeas corpus will not be allowed to do service for an appeal." However, this general principle was qualified in *Sunal* itself, 332 U.S. at 182, and later in *Kaufman* v. *United States*, 394 U.S. 217, 223 (1969), by the Court's statement that such relief is not to be denied solely on that ground where the claim asserted is constitutional in nature. The Court in *Kaufman* was careful to note, however, that even a constitutional claim otherwise cognizable under section 2255 could be rejected where a federal prisoner "has deliberately by-passed the orderly federal procedures provided at or before trial and by way of appeal," 394 U.S., at 227 n.8—a principle well-recognized in this Circuit.

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* Although the government expressly and incorrectly conceded in the District Court that Walters could raise his current claims in a 2255 proceeding even though he failed to perfect a direct appeal, that concession by the government on a question of law is not binding on this Court and does not preclude review of that question on this appeal. *See United States* v. *Tortorello*, Dkt. No. 75-1376 (2d Cir., April 1, 1976), slip op. 2879, 2883.

United States v. *West*, 494 F.2d 1314 (2d Cir.), *cert. denied*, 419 U.S. 899 (1974); *United States* v. *Williams*, 463 F.2d 1183, 1184 (2d Cir. 1972); *Zovluck* v. *United States*, 448 F.2d 339, 341 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972); *United States* v. *Gordon*, 433 F.2d 313, 314 (2d Cir. 1970); *Castellana* v. *United States*, 378 F.2d 231, 233 (2d Cir. 1967) ("It is well settled law that § 2255 cannot be utilized in lieu of an appeal."); *United States* v. *Angelet*, 265 F.2d 155, 157 (2d Cir. 1959). As this court succinctly held in *United States* v. *Gordon*, *supra* at 314:

> "A motion under section 2255 may not be used to review grounds which defendant failed timely to raise at trial and on appeal."

See *Fay* v. *Noia*, 372 U.S. 391, 438 (1963).

In the instant case, there is no question but that the defendant and his attorney were uniquely and fully aware of the facts upon which the present claim of constitutional infirmity rests, since that claim arises directly from the relationship between the two during the trial. Nonetheless, no motion for a mistrial nor indeed for any other kind of relief, beyond the defendant's own objection at the time, was made by defense counsel during or after the trial.

More importantly, however, appellant failed to raise this issue, or indeed any other, by way of appeal, for he did not appeal his conviction. Accordingly, it is clear that "petitioner here 'deliberately by-passed' normal appellate procedures and is foreclosed at this late date from raising the claim." *Williams* v. *United States*, 334 F. Supp. 669, 671 (S.D.N.Y.), *aff'd*, 463 F.2d 1183 (2d Cir. 1972). Indeed, a clearer case of deliberate by-pass would be hard to imagine.* Further, appellant has failed

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* In *Kaufman*, the Supreme Court was careful to note that "This certainly is not a case where there was a 'deliberate by-pass' of a direct appeal." 394 U.S., at 220 n.3. There petitioner raised

[Footnote continued on following page]

to set forth any reason why, with knowledge of all the basic facts upon which his present claim of constitutional infirmity rests, the claim was not advanced upon direct appeal. Accordingly, the order of the District Court denying his § 2255 motion should be affirmed without reaching the merits.

POINT II

The Court neither abused its discretion in refusing to delay indefinitely the commencement of trial nor did it infringe upon appellant's Sixth Amendment right to counsel by appointing counsel to represent him for the purpose of jury selection only.

It is appellant's contention on appeal that the court abused its discretion in refusing further to delay the selection of a jury until appellant's retained counsel could be present, and that as a result, petitioner was denied his constitutional right to be represented by the counsel of his choice.

It is the government's position that where, having already granted appellant a brief continuance and learning counsel would not appear, the court appointed another attorney to represent appellant for purposes of jury

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the constitutional claims in a letter to the Court of Appeals, after oral argument of his direct appeal, when counsel failed to raise the issues. The Court of Appeals, however, did not discuss them in its opinion affirming the conviction. Here no appeal whatsoever was taken. *Cf. United States* v. *Loschiavo,* Dkt. No. 75-1310 (2d Cir. March 3, 1976), slip op. 2223, where this Court affirmed a lower court order granting 2255 relief, even though defendant on direct appeal had, at least arguably, deliberately by-passed his non-constitutional claim of lack of subject matter jurisdiction. This Court there concluded that to deny 2255 relief would result in a "miscarriage of justice" since, subsequent to defendant's direct appeal, a change in the law of this Circuit had established that he had been convicted of an offense not cognizable by a federal court.

selection only, after which time it adjourned the proceedings until the following day, (a) the court did not abuse its discretion in refusing to delay further the commencement of trial, and (b) that appellant's Sixth Amendment right to counsel was not infringed since appellant suffered no prejudice.

It is of course true that the right of an accused to be represented by counsel during any critical stage of criminal proceedings against him is guaranteed by the Sixth Amendment to the Constitution, *United States* v. *Wade*, 388 U.S. 218 (1967); *United States* v. *Maryland*, 373 U.S. 59 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). Similarly, there is no question but that the impanelling of a jury is a part of the trial itself, *United States* v. *Miller*, 463 F.2d 600 (1st Cir. 1972), and hence that the accused is entitled to be represented by counsel at that time.* Ancillary to that Sixth Amendment right to counsel, "a defendant should be afforded a fair opportunity to secure counsel of his own choice." *Powell* v. *Alabama*, 287 U.S. 45, 53 (1932); *Glasser* v. *United States*, 315 U.S. 60 (1942).

Unlike the Sixth Amendment right to counsel from which it derives, however, the right to be represented by counsel of one's choice is not absolute, *United States ex rel. Carey* v. *Rundle*, 409 F.2d 1210, 1215 (3d Cir. 1969), *cert. denied*, 397 U.S. 946 (1970). Thus, while every defendant has an absolute right to counsel, "No defendant has an absolute right to any particular counsel". *United States* v. *Tortora*, 464 F.2d 1202, 1210 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); *United States* v. *DiStefano*, 464 F.2d 845, 846 n.1 (2d Cir. 1972). Accordingly, courts

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* Rule 43 of the Federal Rules of Criminal Procedure requires that the defendant actually be present during the impanelling of the jury. See *Lewis* v. *United States*, 146 U.S. 370, 372 (1892).

have required that a defendant be afforded a "reasonable" or "fair" opportunity to secure counsel of his choice, *Powell* v. *Alabama*, *supra*; *Crooker* v. *California*, 357 U.S. 433, 439 (1958); *Chandler* v. *Fietag*, 348 U.S. 3, 10 (1954); *United States* v. *Bentvena*, 319 F.2d 916, 936 (2d Cir.), *cert. denied sub nom. Ormento* v. *United States*, 375 U.S. 940 (1963), and that his choice "should not unnecessarily be obstructed by the court." *United States* v. *Sheiner*, 410 F.2d 337, 342 (2d Cir.), *cert. denied*, 396 U.S. 825 (1961).*

At the same time, it is equally settled that the "decision to grant or deny a continuance is a matter within the sound discretion of the trial judge; the sole requirement imposed is that the decision be reasonable," *United States* v. *Carroll*, 510 F.2d 507, 510 (2d Cir. 1975); *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940); *United States* v. *Rosenthal*, 470 F.2d 837 (2d Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).

Stated simply, the issue before this Court is thus whether the court's exercise of its discretion in appointing counsel to represent appellant for purposes of jury selection only and thus proceeding, rather than indefinitely delaying the trial until retained counsel could appear, deprived appellant of a fair and reasonable opportunity to represented by counsel of his choosing. While the determination of that question will turn upon the facts and circumstances of the particular case, *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964), in order to obtain relief under the law in this Circuit, appellant must demonstrate that

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* "The constitutional mandate is satisfied so long as the accused is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no arbitrary action prohibiting the effective use of such counsel. . . . [A]lthough the right to counsel is absolute, there is no absolute right to a particular counsel." *United States ex rel. Carey* v. *Rundle*, *supra* at 1215.

"the trial judge acted arbitrarily and substantially impaired the defendant's ability to defend himself," *United States* v. *Ellenbogen*, 365 F.2d 982, 985 (2d Cir. 1966), *cert. denied*, 386 U.S. 923 (1967), or in some way prejudiced him, *United States* v. *Tortora, supra.*

Far from having acted arbitrarily in this matter, the court was motivated to take the action it did by a careful weighing of the conflicting interests, namely the defendant's right to representation by counsel of his choice and the court's concern for the expeditious and orderly functioning of the criminal justice system.

Appellant appears to reject such an analysis of the issue, however, and argues that it is the presence or absence of intent to delay on the part of the defendant which is critical. Thus, he claims that "In the absence of a showing that the defendant has deliberately attempted to interfere with the sound administration of justice by intentionally delaying the proceedings, the trial court is required to afford the defendant a reasonable chance to be represented by counsel of his choice." (Brief at 6). This merely begs the question, however, which is whether the defendant was in fact afforded a reasonable opportunity, and this determination can be made only by engaging in the balancing process previously described.* In applying this balancing test, the courts have paid particular attention to the burdens imposed upon the efficiency and effectiveness of the criminal process. See *United States* v. *Bentvena, supra* at 936; *United States* v. *Mitchell*, 354 F.2d 767, 769 (2d Cir. 1966); *Releford*

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* The court may of course give weight to the fact that the defendant deliberately seeks to delay the proceedings, see *United States* v. *Maxey*, 498 F.2d 474 (2d Cir. 1974), but the absence of such intent standing alone cannot deprive the court of the power to proceed, having assured itself that the defendant will not be unduly prejudiced thereby.

v. *United States*, 288 F.2d 298, 301 (9th Cir. 1961). As the court in *United States ex rel. Carey* v. *Rundle*, *supra* at 1214, explained:

> Desirable as it is that a defendant obtain private counsel of his own choice, that goal must be weighed and balanced against an equally desirable public need for the efficient and effective administration of criminal justice. The calendar control of modern criminal court dockets, especially in metropolitan communities, is a sophisticated operation constantly buffeted by conflicting forces. The accused's rights such as those relating to a speedy trial, to an adequate opportunity to prepare the defense, and to confront witnesses—are constantly in potential or real conflict with the prosecution's legitimate demands for some stability in the scheduling of cases. . . . To permit a continuance to accommodate one defendant may in itself prejudice the rights of another defendant whose trial is delayed because of the continuance. Played to an extreme conclusion, this indiscriminate game of judicial musical chairs could collapse any semblance of sound administration, and work to the ultimate prejudice of many defendants awaiting trial in criminal courts.

Turning then to the facts of this case, as previously noted, appellant's retained counsel, Graves, failed to appear on the morning trial of this five-defendant narcotics case was scheduled to begin, despite the fact that the trial date had been fixed and notice conveyed to him both orally and in writing some two and one-half months earlier, and despite his promise to the court that he would have a substitute attorney present in the event he was unable to appear (Tr. 18, 55-57). Although five

attorneys, four defendants, the Assistant United States Attorney, all the government witnesses, as well as the court and the panel of prospective jurors were present and waiting to commence trial (Tr. 55, 56, 58), the court initially delayed the commencement of jury selection *sua sponte* in hopes appellant's counsel might yet appear.* When counsel failed to appear late that morning, the trial court inquired of appellant whether he objected to having appointed counsel represented him for purposes of jury selection only. (Tr. 14). When Walters indicated he preferred to wait for his own attorney, the court in effect granted another continuance in hopes that counsel might yet appear. The court noted, however, that, having no indication whatsoever from appellant or his counsel as to when counsel might be available, it would not thus delay the proceedings indefinitely. (Tr. 14-15). Finally, appellant's counsel sent word that he was engaged in civil court, would not be able to appear and requested that appellant's case be severed from that of his co-defendants. (Tr. 19). That communication was noteworthy in two respects, however, for counsel did not ask for a continuance but only a severance,** and more importantly, counsel failed to apprise the court in any way

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* It is indeed instructive that in virtually all the cases relied upon by appellant one defendant alone was on trial. Aside from the fact that delays in such cases would not inconvenience other defendants or their counsel, such cases would generally tend to involve fewer witnesses and to be less lengthy. Further, under no circumstances would it be necessary for the government to try the case twice for different defendants.

** Later that afternoon, well after the jury had been impanelled, Graves finally did request a continuance. (Tr. 70). Judge Lasker had earlier noted that he would not proceed beyond the process of jury selection without appellant's own counsel present (Tr. 20-21, 60), and he ultimately granted the continuance. (Tr. 73).

as to when he might be available to represent Walters.* (Tr. 19-20). At this point, the trial court was thus forced to choose between (1) severing the defendant's case and trying it separately at a later date, (2) staying indefinitely the commencement of the trial of all five defendants until appellant's counsel could appear, and (3) appointing counsel to represent appellant for purposes of jury selection only, and evaluating at that point whether to have Walters obtain new counsel, retained or otherwise. The court chose the latter course of action, taking care to insure that appellant was in no way prejudiced by this procedure. (Tr. 11-14, 20).**

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* Although Graves did in fact appear and represent Walters the next day, it must be stressed that at the time the court had to decide which course of action to take, it had no idea when Graves would be available. As the Supreme Court advised in *Ungar* v. *Sarafite, supra* at 589, whether there was an abuse of discretion "must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." Furthermore, it's not at all clear that Graves would have appeared the next day but for Judge Lasker's efforts in having him brought to the courthouse that afternoon. At that time, the jury had of course already been impanelled. Judge Lasker then adjourned further proceedings until the following day.

** Although appellant does not challenge on this appeal the propriety of the court's decision to deny the severance motion (Tr. 55-56), he intimates that "a reasonable opportunity to be represented by counsel of his choice . . . would include 'the grant of severance and a reasonable continuance to secure substituted counsel.'" (Brief at 8). Aside from the fact that Walters at no point indicated a willingness or desire to seek other counsel, it is clear that he was not even remotely entitled to severance of his case.

A motion for severance pursuant to Rule 14 of the Federal Rules of Criminal Procedure is addressed to the sound discretion of the trial court, *Opper* v. *United States*, 348 U.S. 84 (1934); *United States* v. *Adams*, 434 F.2d 756, 758 (2d Cir. 1970); and will not granted except upon a showing that the defendant would be seriously prejudiced by being tried together with others,

[Footnote continued on following page]

Applying the previously described balancing test to the facts before him at the time, as explained in his opinion denying appellant's § 2255 motion, Judge Lasker stated:

> The desirable goal that a defendant obtain counsel of his own selection must be balanced against the public interest in the expeditious handling of criminal cases. Witnesses, prospective jurors and prosecutors are entitled to reasonable stability in the scheduling of cases. Further, accommodating a particular defendant by delaying his trial might in itself prejudice the rights of co-defendants or defendants in following trials. 404 Supp. at 998.

Schaffer v. *United States*, 362 U.S. 511 (1959); *United States* v. *Caci*, 401 F.2d 664 (2d Cir. 1968), *cert. denied*, 394 U.S. 917 (1969); *United States* v. *Bentvena*, *supra*, at 931-32. The interests of convenience, economy and efficient administration of justice dictate that persons joined in the same indictment should be tried together, particularly where the proof will be extensive and numerous witnesses will be summoned. *United States* v. *Lebron*, 222 F.2d 531, 535 (2d Cir.), *cert. denied*, 350 U.S. 876 (1955); *United States* v. *Crisona*, 271 F. Supp. 150 (S.D.N.Y. 1967). Accordingly, severances in complex conspiracy cases are granted only for "the most compelling reasons." *United States* v. *Melville*, 312 F. Supp. 234, 235 (S.D.N.Y. 1970). The factors which should be considered in the exercise of that discretion involve balancing the possible prejudice to the defendant against the duplicate expense, consumption of time, and use of court facilities that separate trials require, *United States* v. *Finkelstein*, 526 F.2d 517, 523-525 (2d Cir. 1975); *United States* v. *Fassoulis*, 49 F.R.D. 43, 44-45 (S.D.N.Y. 1969), *aff'd*, 445 F.2d 13 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971).

In the instant case, appellant failed to make any showing of prejudice whatsoever. (Tr. 55-56). Moreover, were the unavailability of retained counsel under these circumstances deemed sufficient to require severance, Rule 14 would be rendered a hollow shell, and the courts and the government burdend with multiple trials. Accordingly, there is no question but that the trial court did not abuse its discretion in denying appellant's severance motion.

It is of course true that a different set of facts might compel a court to strike a different balance between the defendant's right to counsel of his choice and the interests in orderly criminal process. It is clear, however, that under the facts of this case, the court did not abuse its discretion in striking the balance it did, and that appellant was afforded a reasonable opportunity to be represented by counsel of his choice, for as Judge Friendly noted in *United States* v. *Di Stefano*, *supra*, 464 F.2d, at 846 n.1, "The Sixth Amendment right to counsel does not include the right to a lawyer whose other engagements prevent a speedy trial." That this is so is made abundantly clear when one examines the other side of the balance in this case, namely, the absence of any prejudice to Walters arising from the absence of counsel of his choice during jury selection.

Appellant fails to allege or to demonstrate any prejudice to him arising from the procedure followed by the court in this case. Rather, he claims that where a defendant is denied counsel of his choice at any critical state of criminal proceedings, "no prejudice need be shown," but must be assumed. (Brief at 10).* However, since the right to counsel of one's choice is not absolute, *United States ex rel. Carey* v. *Rundle*, *supra*, and claimed

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* Appellant relies upon *Releford* v. *United States*, *supra* at 302, and *United States* v. *Johnston*, 318 F.2d 288, 291 (6th Cir. 1963) for this proposition. In each of those cases, however, counsel appointed over the defendant's objections represented him *throughout* the trial, and the courts thus declined to require any particularized demonstration of prejudice. In *Releford*, where appointed counsel "did not willingly serve," the court stressed that it was the "complete disregard of the defendant's right to choose his own counsel" which led it to assume prejudice. 288 F.2d, at 302. Moreover, both cases involved situations in which counsel was appointed on the eve of trial and thus raised concerns about inadequate preparation. *But see United States* v. *Dardi*, 330 F.2d 316, 335 (2d Cir. 1964).

infringements thereof must be examined in light of the competing demands of orderly judicial process, courts will not simply assume prejudice to exist whenever a defendant is denied counsel of his choice, but will require a showing of prejudice, or impairment of the defendant's ability to defend himself, *United States* v. *Ellenbogen*, *supra*. This Court explicitly so indicated in *United States* v. *Tortora*, *supra*:

> Santoro's only other claim of substance is that he was deprived of his Sixth Amendment right to the counsel of his choice. We cannot agree. No defendant has an absolute right to any particular counsel. . . . Santoro was informed of the trial date more than three months in advance and was advised by the court that other counsel should be secured if Lanna were unable to appear. In fact, Santoro was represented by Mr. Rosato, who was familiar with the case, and by Mark Landsman, a Legal Aid Attorney. Thus no prejudice resulted to him from the unavailability of Lanna. 464 F.2d at 1210.

See United States v. *Dardi*, 330 F.2d 316, 335 (2d Cir. 1964) (no prejudice shown where assigned counsel represented defendant throughout trial).

It is clear that under the facts of this case, appellant suffered no prejudice in being represented by appointed counsel rather than counsel of his choice. First, as noted, appellant was so represented during jury selection only and not throughout the trial.* Accordingly, no

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* The fact alone significantly distinguishes many of the cases upon which appellant relies. Thus in *United States* v. *Johnston*, 318 F.2d 288 (6th Cir. 1963); *Releford* v. *United States*, 288 F.2d 298 (9th Cir. 1961); and *Lee* v. *United States*, 235 F.2d 219 (D.C. Cir. 1956), the defendants were represented by counsel

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claim of prejudice arising from lack of preparation, for example, exists in view of the nature of jury selection itself. Indeed, this is particularly true in the federal courts where counsel play a limited role in the choosing of the jury.*

The only practical source of prejudice in the process of jury selection would appear to arise from a possible conflict of interest between the defendants represented by common counsel. Here, however, there was no conflict of interest bteween Walters and Boone, whose counsel was appointed to represent appellant. Indeed, the trial was very careful to assure that none existed,** and explicitly so found, stating that "I am persuaded that

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appointed over their objections *throughout* the trial. In *United States ex rel. Davis* v. *McMann*, 386 F.2d 611 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1960), and for all practical purposes in *United States* v. *Mitchell*, 354 F.2d 767 (2d Cir. 1966), the defendant was forced by the court's conduct to proceed *without* counsel. *But see United States* v. *Dardi*, *supra* at 335.

Where a defendant is represented by counsel appointed the eve of trial, courts will be much more inclined to assume prejudice in view of the obvious problems of adequate preparation which arise in even the simplest case. Jury selection involves no such preparation and thus does not give rise to the same concern.

* Any possible prejudice is even further diluted in the instant case by the fact that in this five-defendant conspiracy trial, the court required the defendants' peremptory challenges to be exercised jointly. (Tr. 10). Accordingly, whether represented by retained or appointed counsel, it was necessary to obtain the agreement of four other defense counsel before exercising a challenge. (Tr. 60).

** Judge Lasker first questioned co-defendant Saunders and his attorney, Mr. Berne, but found that dual representation was not possible in that case. (Tr. 12-13). He then explored the matter with appellant, Boone and his attorney and explained to the defendant that "[B]ased on Mr. Brown's statement that he as a lawyer does not know of any conflict that would prevent him from representing you fairly in the choosing of a jury, I may have to order that you be represented." (Tr. 15).

your interests will not be adversely affected by having somebody else represent you merely in the choosing of the jury." (Tr. 20).*

Finally, it must be noted that in prior cases involving substantially the same situation as the instant case, courts have failed to find any prejudice to have resulted from representation by appointed counsel during jury selection only. As explained in *Urban* v. *United States*, 46 F.2d 291 (10th Cir. 1931):

> Urban, Sr., and De Cola were personally present when the case against them was called for trial at 4:30 p.m., October 2, 1929. Mr. A. R. Morrison, Esq., counsel for Urban, Sr., was absent. The court thereupon appointed counsel to represent Urban, Sr., and proceeded to impanel the jury. It then adjourned the trial until the following morning, when Mr. Morrison, on behalf of Urban, Sr., objected to the trial proceeding on

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* Appellant does not now claim any conflict of interest existed. Although he made a general claim to that effect for the first time only after the jury was selected (Tr. 60), at no time either in the lower court or now has appellant offered any showing or explanation of the claimed conflict. In the face of this record and the court's explicit findings, he has apparently abandoned any such claim. It is settled that "some specific instance of prejudice, some real conflict of interest, resulting from joint representation must be shown to exist before it can be said that appellant has been denied the effective assistance of counsel." *United States* v. *Lovano*, 420 F.2d 769, 773 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970); *United States* v. *Mari*, 526 F.2d 117, 119 (2d Cir. 1975). While the claim here is not of course one of ineffective assistance of counsel, the failure to demonstrate any prejudice arising from dual representation, whether because of a conflict or some other factor relating to the effectiveness of counsel, is highly relevant in demonstrating the absence of any prejudice and hence of any infringement of the right to counsel of one's choice. See *Lofton* v. *Procunier*, 487 F.2d 434 (9th Cir. 1973); *United States* v. *Dardi*, *supra* at 335.

> account of the fact that the jury had been impanelled during his absence. The court overruled his objection. Urban, Sr., and De Cola were convicted and sentenced, and have appealed.
>
> Counsel for Urban, Sr., contend that the court erred in impanelling the jury in the absence of the regularly employed counsel for Urban, Sr. The case had been duly set for trial and both Urban, Sr., and his counsel notified. Urban, Sr., was represented, during the impanelling of the jury, by counsel appointed by the court. No prejudice is shown. Under these circumstances, we think no error resulted from the ruling of the court. 46 F.2d at 292-93.

Similarly, in *Smith* v. *United States*, 288 F. 259, 260 (D.C. Cir. 1923), as in the instant case, defendant's counsel was engaged in another court when the case was called for trial. After postponing the matter until the afternoon, the court appointed another attorney to represent appellant and proceeded to impanel a jury. When the first witness was called, the original attorney appeared. After objecting to the court having thus proceeded, he represented his client for the remainder of the trial. In arriving at the same conclusion as did Judge Lasker in the instant case, the court held:

> It is urged that . . . the constitutional rights of the defendant have been invaded, in that he was not allowed, in the impanelling of the jury, the assistance . . . of counsel of his own selection, . . .
>
> We agree with the proposition that an accused is entitled to have the assistance of counsel for his defense, which implies that he shall have an opportunity to select such counsel, . . . On the other hand, the right to select his own counsel

> cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same. In this case the defendant and his chosen attorney had ample notice that the case would be proceeded with when reached on the date to which it had last been continued, and it was the duty of defendant or his counsel to then be present, prepared either for trial or to show cause for further continuance. If it were shown that the attorney assigned to represent the defendant was unsatisfactory to him, was incompetent, that he mismanaged the case so far as he had to do with it, *or that in any way the defendant had been actually prejudiced by the assignment of counsel, we might feel inclined to hold that prejudicial error had been committed; but there is no such showing.* 288 F., at 260-61. (Emphasis added.)

In the absence of any showing of prejudice in this case, too, it is clear that when balanced against the substantial interests of judicial administration noted by Judge Lasker, the court did not abuse its discretion by appointing counsel to represent appellant and proceeding only to select a jury, and that appellant's right to be represented by counsel of his choice was thus not infringed.

CONCLUSION

The order of the District Court denying the motion without a hearing should be affirmed.

Respectfully submitted,

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Assistant United States Attorneys, Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JERRY L. SIEGEL being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 12th day of ~~April~~ , 1976, he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Stephen Wizner
Yale Legal Services Organization
127 Wall St
New Haven, Conn. 06520

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Jerry L. Siegel

Sworn to before me this

12th day of Dec., 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977